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No. 01-1352

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION AND
DAIMLERCHRYSLER CORPORATION,

Petitioners,

v.

CITY OF SEATTLE,

Respondent.

On Petition For Writ of Certiorari
To The Washington Court Of Appeals

PETITIONER'S REPLY BRIEF

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SUMMARY

The issue in this case is whether Seattle's tax law violates the Commerce Clause because it taxes 100% of the income produced by interstate selling activities conducted predominately outside the City. Seattle claims that its tax is fairly apportioned because, the City argues, it is "identical in all relevant respects to the State of Washington's" tax – i.e., the ***city*** tax is imposed only on sales of goods delivered within the ***State*** of Washington. Resp. Br. at 10, 2. Seattle's representation of its tax is wrong as a matter of law, because its characterization is belied by the express language of the city's ordinance. It is wrong as a matter of fact because Seattle imposed the tax in this case on the activity of selling cars delivered by the Automakers at their plants outside Washington. Even if Seattle's representation of its tax law were correct, the tax is nonetheless unconstitutional because it is "impermissibl[y] overreaching" "beyond that portion of value that is attributable to economic activity within" its borders. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

By permitting Seattle's taxation of income produced by activities that are conducted in other jurisdictions and thus served by other governments (not Seattle), the state court's decision is in conflict with the decisions of this Court and the courts of other states. If left uncorrected by the Court, the decision below will permit and encourage the same extraterritorial overreaching by the scores of other cities across the country that currently have similar taxes or will perceive that such taxes are permissible, to the detriment of the very interstate commerce that the Commerce Clause is supposed to protect.

ARGUMENT

1. Seattle's characterization of its tax law is belied by the law itself. Seattle's claim that its tax applies only when goods are delivered in the State of Washington is plainly false as a

matter of law: the tax law challenged in this case explicitly imposes a gross receipts tax whenever any "business activities" are performed in the city "without regard to the place of delivery of articles, commodities or merchandise sold." Seattle Code § 5.44.400C. Pet. App. 61a.[1]

2. Seattle's representation of its tax law is disproven by the place of delivery in this case. If Seattle's tax were in fact limited to sales of goods delivered in Washington, the tax would not have been imposed on the Automakers. The Court of Appeals noted that their sales were made "f.o.b. factory," which delivery term established that the goods were delivered at the Automakers' factories outside Washington. Pet. App. 2a.[2]

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[1] The City is also wrong in arguing that a city rule (Rule 193A, adopted at the end of the tax periods at issue) limits the tax to sales of goods delivered locally. Resp. Br. at 2-3. Rule 193A is inapplicable on its face to the inbound interstate sales at issue. The Automakers engaged only in interstate commerce ***inbound*** to Seattle, and Rule 193A applies only to "***Outbound sales ... which originate in the City***" and are shipped "outside Washington." Rule 193A(1), (3). Regrettably, the words of the rule that disclose that it does not apply to this case's inbound commerce were omitted in favor of ellipses in the City's quotation of the rule. *Contrast* Resp. Br. at 2 *with* Resp. App. 1a-2a. The City confirmed to the Washington Supreme Court that "Seattle has not adopted the equivalent of Washington's WAC 458-20-103," the rule that limits the state's tax to sales in which "the goods sold are delivered to the buyer in this state." Answer to Petition for Review at 8.

[2] Wash. Rev. Code 62A.2-319(1) ("the term F.O.B. ... is a delivery term."); *Matsushita Elec. Corp. v. Salopek*, 787 P.2d 963, 965 (Wash. Ct. App.), *review denied*, 114 Wn.2d 1029 (Wash. 1990) (because the "invoices were F.O.B. warehouse, delivery occurred at the Panasonic warehouse"); 1 J. White & R. Summers, *Uniform Commercial Code*, § 3-5, at 144 (3d ed. 1988).

3. Seattle's taxation of these inbound sales, where delivery and most of the selling activities occur outside the City, is exactly the burden on interstate commerce forbidden (and prevented) by the Commerce Clause's requirement of fair apportionment. Seattle's taxing, without regard to the place of delivery, the entire gross income from interstate sales activity conducted overwhelmingly outside Seattle (merely because a small portion of "business activity" occurs in that City), violates the constitution's requirement of fair apportionment, just as Washington State's tax did in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 436-39 (1939). Pet. at 11. As the Court more recently described the requirement of fair apportionment, its "central purpose" is to ensure that local government does not tax value created outside its borders. *Jefferson Lines*, 514 U.S. at 184; *Allied-Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768, 780 (1992)(the Commerce Clause imposes "a necessary limit on the State's authority to tax income that cannot in fairness be attributed to the taxpayer's activities within the State"). Seattle is taxing more than its "fair share of [the] interstate transaction." *Jefferson Lines*, 514 U.S. at 184.

4. If Seattle actually taxed "only" sales delivered anywhere within the State of Washington (as it claims), it would nevertheless be taxing an activity conducted outside the City's taxing jurisdiction. While a ***state*** tax on delivery within the ***State*** of Washington relates to activity within the taxing authority's boundaries, a ***city*** tax on delivery within the ***State*** of Washington does not. The City of Seattle's geographic boundaries, and its taxing jurisdiction, are decidedly smaller than the borders of the State of Washington.

5. Regardless of the incident of Seattle's tax, it taxes value created by activities conducted outside its borders, in violation of the Commerce Clause. While limiting the nominal subject (or incident) of Seattle's tax to the act of delivery might

address the risk of multiple taxation (if the tax were limited to delivery within the City), it would not cure the constitutional flaw that the value taxed by Seattle is the entire gross income from numerous activities, almost all of which are conducted outside the City.[3] The Court's apportionment ruling in *Tyler Pipe Indus. Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 251 (1987), on which the City relies, was based exclusively on consideration of the risk of multiple taxation. While multiple taxation is also an issue in this case (*see* Pet. at 7-8). the Commerce Clause's apportionment requirement is principally concerned with preventing the imposition of tax on value created by activities outside the taxing jurisdiction. Justice Brennan identified the problem nearly 40 years ago:

> [I]t is the commercial activity within the State, and not the sales volume, which determines the State's power to tax, and by which the tax must be apportioned. . . . [I]f commercial activity in more than one State results in a sale in one of them, that State may not claim as all its own the gross receipts to which the activity within its borders has contributed only a part. Such a tax must be apportioned to reflect the business activity within the taxing State. ...

General Motors v. Washington, 377 U.S. 436, 450-51, (Brennan, J., dissenting)(citations omitted) (1964), *rev'd on other grounds, Tyler Pipe*, 483 U.S. at 248. More recently the Court has confirmed that it will test the measure of the tax, not just the incident, in judging the apportionment of a tax on business activities:

> [L]abeling [a tax as] a tax on "business activity" does not permit us to forego examination of the

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[3] The limited activities of Automakers' representatives traveling into Seattle made no more than a de minimis contribution to the value taxed by Seattle. *See* Pet. at 3-4.

> actual tax base and apportionment provisions. "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes."

Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358, 374 (1991)(citation omitted). In *Jefferson Lines*, the Court made clear that the "central purpose" of the apportionment requirement is to limit taxing authorities to their "fair share of an interstate transaction" based on the contribution to value from the activities conducted within the taxing jurisdiction. 514 U.S. at 184.[4] The Court held that gross receipts taxes are "simply a variety of tax on income, which [are] required to be apportioned to reflect the location of the various interstate activities by which [the receipts are] earned." 514 U.S. at 190. The nation's preeminent state tax scholars immediately recognized the importance of the Court's *Jefferson Lines* decision for the apportionment of gross receipts taxes:

> After *Jefferson Lines*, gross receipts taxes on interstate transactions should not be exempted from the apportionment requirement on the basis of a false analogy to retail sales taxes. ...

Hellerstein, McIntyre & Pomp, *Commerce Clause Restraints on State Taxation after Jefferson Lines*, 55 Tax L. Rev. 47, 97-98 (1995). Like these scholars, the Court in *Jefferson Lines* recognized that gross receipts taxes must be apportioned when they are imposed (like Seattle's) on income created by business activities occurring in more than one jurisdiction. In contrast, sales taxes need not be apportioned (or are inherently so)

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[4] Concern for fair share was likewise the basis on which the California Supreme Court required apportionment of Los Angeles' gross receipts tax on facts indistinguishable from the present case. *General Motors v. Los Angeles*, 486 P.2d 163 (Cal. 1971). As discussed in the Petition , the California Supreme Court expressly based its decision on this Court's apportionment jurisprudence. *See* Pet. at 13, n. 8.

because they are imposed on an event that occurs at a single time and place – and thus in only one jurisdiction, which can tax the entire, unapportioned purchase price without risk of extraterritorial or multiple taxation.

6. If left uncorrected, the decision below will encourage extraterritorial taxation by scores of cities with similar taxes. Contrary to Seattle's suggestion, the Automakers do not claim that the apportionment issue presented is important because it is novel. Resp. Br. at 15. On the contrary, it is important – and the Court's direction is needed – because the problem is so pervasive and continues to be litigated so repeatedly. The present case is significant because scores of cities – just like Seattle, Tacoma, Los Angeles, and the other cities identified in the Petition – continue to "poach" by extending their taxes to activities conducted (and income produced) outside their borders. Especially in the current economic climate, if the Court were to leave the state court decision intact, it would permit and encourage this very harm to interstate commerce that the Commerce Clause is intended to prevent.

CONCLUSION

For the reasons set forth above and in the Petition, the Automakers respectfully request that the Court grant certiorari to review the state court's decision.

Respectfully submitted,

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